

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 ) WT Docket No. 96-199  
Amendment of Part 90 Concerning the )  
Commission's Finder's Preference Rules )

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: September 17, 1996**

**Released: September 27, 1996**

**Comment Date:** November 18, 1996  
**Reply Comment Date:** December 3, 1996

By the Commission:

**I. Introduction**

1. This *Notice of Proposed Rule Making (Notice)* proposes to amend Part 90 of our Rules to eliminate the finder's preference program<sup>1</sup> in the 220-222 MHz band in light of our proposals to implement a new licensing approach for this band.<sup>2</sup> The *Notice* also seeks comment on the utility of the finder's preference program for private land mobile radio (PLMR) services authorized for the 470-512 MHz, 800 MHz and 900 MHz bands.

**II. Executive Summary**

2. Under Section 90.173(k) of our Rules, persons may apply for a finder's preference for channels assigned on an exclusive basis in the 220-222 MHz, 470-512 MHz, 800 MHz and 900 MHz frequency bands by submitting information that leads to the Commission's recovery of unused channels in these bands. The *Notice* proposes to eliminate the finder's preference

<sup>1</sup> See 47 C.F.R. § 90.173(k). Applicants for licenses in specified land mobile bands receive a dispositive licensing preference for finding unused channels that are ultimately recovered by the Commission.

<sup>2</sup> Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act--Regulatory Treatment of Mobile Services, GN Docket No. 93-252, and Implementation of Section 309(j) of the Communications Act--Competitive Bidding, 220-222 MHz, PP Docket No. 93-253, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 188 (1995) (*Third Notice*). See *id.*

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program in the 220-222 MHz band in light of our proposals in PR Docket No. 89-552 to implement geographic area licensing and use competitive bidding to choose among mutually exclusive initial applications.<sup>3</sup> This is consistent with our decision to eliminate the finder's preference program in the 800 MHz and 900 MHz Specialized Mobile Radio (SMR) services when we adopted a geographic area licensing approach and competitive bidding procedures for those services. The *Notice* also seeks comment on the usefulness and benefits of continuing the finder's preference program for the PLMR services in the 470-512 MHz, 800 MHz, and 900 MHz bands.

### III. Background

3. The Commission proposed the finder's preference program<sup>4</sup> in response to suggestions from the Special Industrial Radio Services Association (SIRSA)<sup>5</sup> and the National Association of Business and Educational Radio (NABER).<sup>6</sup> These parties suggested that the Commission give a preference to an eligible licensee which brings to the Commission's attention a station which has not met our construction, loading, or operational rules in the 800-900 MHz band. Specifically, they proposed that persons with information that might lead to a channel recovery on the basis of station non-construction, insufficient loading, or discontinuance of operation would file information with the Commission identifying the station licensee and alleged rule violation(s).<sup>7</sup> Simultaneously, these persons, the "finders," would submit to the appropriate frequency coordinator a completed application for the "found" frequency, along with a copy of

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<sup>3</sup> There are 200 channel pairs available in this band, with channel spacing of 5 kilohertz. One megahertz of the spectrum (100 channel pairs) is designated for trunked systems. The other megahertz is subdivided into: (1) thirty channel pairs, separated into blocks of five and ten channels, for use by non-commercial non-government nationwide systems; (2) twenty channel pairs, allocated in four blocks of five channel pairs, for nationwide non-government commercial systems; (3) two blocks of five channel pairs allocated for nationwide systems operated by the federal government; (4) ten channel pairs set aside for public safety/mutual aid communications; (5) fifteen channel pairs designated for non-trunked systems operating in a data-only mode; (6) ten channel non-trunked pairs available for either voice or data transmissions; and (7) five channel pairs designated for the Emergency Medical Radio Service, Subpart B, Part 90. The geographic area licensing that is proposed applies to the 100 channel pairs for trunked systems, the fifteen channel pairs designated for non-trunked systems operating in a data-only mode, and the ten channel non-trunked pairs available for either voice or data transmissions.

<sup>4</sup> Amendment of Part 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, PR Docket No. 90-481, *Notice of Proposed Rulemaking*, 5 FCC Rcd 6401, 6403-05 (1990) (*Finder's Preference Notice*).

<sup>5</sup> SIRSA is now named the Industrial Telecommunications Association (ITA).

<sup>6</sup> NABER is now named the Personal Communications Industry Association (PCIA).

<sup>7</sup> *Finder's Preference Notice*, para. 16.

the information provided to the Commission.<sup>8</sup> In support of their suggestion, SIRSA and NABER argued that these procedures would maximize utilization of scarce frequencies by giving unused or underutilized channels to those who actually need them.<sup>9</sup>

4. In adopting the finder's preference proposal of SIRSA and NABER, the Commission noted that frequencies in the 800 MHz and 900 MHz bands are extremely scarce in some areas.<sup>10</sup> The Commission noted that it had conducted several oversight programs and compliance review programs to assure as much as possible that channels were constructed and placed into operation. These programs were productive, having recovered 824 channels for failure to construct and 152 channels for failure to meet loading standards in the fiscal year preceding the *Finder's Preference Notice*.<sup>11</sup> However, the Commission indicated that its compliance activities were limited due to the limitations on staff resources.<sup>12</sup> Accordingly, the Commission proposed a modified version of the SIRSA and NABER suggestion.<sup>13</sup>

5. The Commission proposed to apply the finder's preference program to 800-900 MHz band frequencies which are assigned on an exclusive basis.<sup>14</sup> It further proposed to apply the program to two other frequency bands which are assigned on an exclusive basis, the 470-512 MHz and 220-222 MHz bands.<sup>15</sup> Finally, the Commission did not propose to implement the finder's preference program for SMR channels, but it asked for comment on whether it should apply the finder's preference program to SMRs. With regard to SMR channels, the Commission noted that these channels were all assigned in many markets and that wait lists were established, which provide an effective reassignment mechanism for recovered channels. Nevertheless, the Commission noted, monitoring of SMR compliance with operational rules "could reveal significant underutilization of channels that our existing compliance procedures do not reveal."<sup>16</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, para. 18.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, para. 19.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

6. Accordingly, the Commission proposed to award a preference to applicants that call to our attention to violations of construction, operation, and loading rules that ultimately result in the recovery of the channels identified. The Commission stated that such parties could uncover facts of which we are not aware or which we can not readily ascertain. It stated that the proposed rule changes would enable it to reassign expired licenses more efficiently, and would encourage the public to assist in our channel recovery efforts.<sup>17</sup> Finally, the Commission found that the proposal, if implemented, would foster spectrum efficiency by identifying more channels that are not being used and by reassigning these channels to persons who will use them effectively.<sup>18</sup>

7. In deciding to establish finder's preference rules,<sup>19</sup> the Commission found the potential benefits of implementing the program to be in the public interest.<sup>20</sup> It found that in many areas of the country, the scarcity of available spectrum for exclusive licenses made it difficult for both new applicants to gain entry and for existing service providers to expand their systems.<sup>21</sup> The Commission found that the program could be a useful adjunct to its ongoing compliance review activities.<sup>22</sup> Accordingly, the Commission established the finder's preference program for frequencies assigned on an exclusive basis in the 220-222 MHz, 470-512 MHz, and the 800/900 MHz bands.<sup>23</sup> In addition, the Commission applied the finder's preference program to SMR frequencies for which waiting lists had already been established.<sup>24</sup> The scope of violations for which finder's preference program applied were violations of construction, placed-in-operation, and discontinuance-of-operation rules.<sup>25</sup>

8. Since the finder's preference program was implemented, we have received 1,427 finder's preference requests. Nine hundred of these requests have been processed to date. Of these 900 requests, the Commission has granted 369 finder's preference awards. Of the 369 requests granted, 292, or 79% were for 800/900 MHz SMR channels. Of the 527 applications still pending, 320, or 83% are also for SMR channels. Recently, however, we have changed the

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<sup>17</sup> *Id.*, para. 22.

<sup>18</sup> *Id.*, para. 29.

<sup>19</sup> Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, PR Docket No. 90-481, *Report and Order*, 6 FCC Rcd 7297 (1991) (*Finder's Preference Order*).

<sup>20</sup> *Id.*, para. 33.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, para. 34.

<sup>23</sup> *Id.*, para. 44.

<sup>24</sup> *Id.*, paras. 45-46.

<sup>25</sup> *Id.*, para. 49.

way we license 800 MHz and 900 MHz SMR systems. For example, 900 MHz SMR spectrum and the upper ten megahertz of 800 MHz SMR spectrum are now licensed by geographic areas, and competitive bidding procedures are used to resolve mutually exclusive initial applications in these services. As a result, we eliminated the finder's preference program for SMR licenses in these bands.<sup>26</sup>

#### IV. Proposal

9. In PR Docket No. 89-552, we proposed, *inter alia*, to implement new licensing rules for the 220-222 MHz band that would license blocks of channels in geographic areas and use competitive bidding to decide among mutually exclusive initial applications.<sup>27</sup> The proposed licensing rules are similar in concept to those adopted for licensing 800 MHz and 900 MHz SMR systems.<sup>28</sup> In adopting a geographic area licensing approach for the 800 MHz and 900 MHz SMR services, we concluded that the public interest would be best served if the geographic area licensee is given exclusive right to any channels that are recovered by the Commission due to the failure of an incumbent to construct or operate a station in accordance with our rules.<sup>29</sup> We believe that the alternative -- to continue the finder's preference program within the context of a geographic licensing approach -- would run counter to the goals underlying our new licensing approach because the geographic area licensee would potentially lose opportunities to provide a uniform service throughout the area. Imposing the finder's preference program under these circumstances would instead force the geographic area licensee to compete for that spectrum or area covered by the incumbent's authorization after already having acquired its license for a larger geographic area or spectrum block under our new geographic licensing rules. To avoid this result, we eliminated the finder's preference for 800 MHz and 900 MHz SMR spectrum.<sup>30</sup> Similarly, we tentatively conclude that the finder's preference program is equally incompatible

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<sup>26</sup> Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas In The 896-901 MHz and The 935-940 MHz Bands Allotted to The Specialized Mobile Radio Pool, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639 (1995) (900 MHz *Seventh Order*); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, Implementation of Section 309(j) of the Communications Act--Competitive Bidding, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 (1995) (800 MHz *Eighth Order*).

<sup>27</sup> See note 2, *supra*.

<sup>28</sup> *Id.* These similarities include licensing by geographic area, auctions for mutually exclusive applicants, and the existence of incumbents in these frequency bands.

<sup>29</sup> 800 MHz *Eighth Order*, paras. 60, 416; 900 MHz *Seventh Order*, para. 49.

<sup>30</sup> *Id.*

with the licensing rules and competitive bidding procedures proposed for the 220-222 MHz band.<sup>31</sup> Thus, we propose to eliminate the finder's preference program for the 220-222 MHz band.

10. We also seek comment on the continued need for the finder's preference program for PLMR services in the 470-512 MHz, 800 MHz and 900 MHz bands. As discussed *supra*, there have been comparatively few finder's preference requests for channels in these bands. Instead, the vast majority of finder's preference grants to date have been for 800 MHz SMR channels. Since we have discontinued the program for these channels, and since we similarly propose to discontinue the program for the 220-222 MHz band, we question whether the program should be maintained solely for channels that have rarely been the subject of finder's preference requests. Moreover, it appears that enforcement of our rules with regard to these PLMR channels can be adequately addressed with ongoing oversight programs and compliance review programs. Thus, we seek comment on whether the finder's preference program should be discontinued in its entirety.

11. We also propose to retain the discretion to dismiss pending finder's preference requests for any services in any frequency bands in which we decide to eliminate the finder's preference program as a result of this rulemaking proceeding. If we should determine, as discussed above, that the finder's preference program is incompatible with geographic licensing or otherwise unnecessary, it may not serve the public interest to grant any pending finder's preference request, particularly for channels that may be licensed on such an area-wide basis (*i.e.*, those in the 220-222 MHz band). Moreover, persons with finder's preference requests on file would not be substantially harmed because there would be an opportunity to apply for the unused frequencies once they become available for licensing. For frequencies in the 220-222 MHz band, finder's preference claimants will have an immediate alternative for seeking licenses in the event we adopt our proposals for this band, because they may apply for the geographic area licenses covering the areas that are subject of their finder's preference requests.

12. Finally, in order to avoid undermining the regulatory framework that we may adopt for the 220-222 MHz band, we have decided to delay processing any finder's preference requests that may be filed in this band pending final action in this proceeding. Continued processing of site-based requests could frustrate the intent of our geographic area licensing proposal by

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<sup>31</sup> Although, as indicated at note 3, *supra*, the Commission proposed the above-described geographic area licensing and competitive bidding process for 125 out of the 200 channel pairs available in this band, we believe that the remainder of the band is similarly unsuitable for finder's preference claims. Most of the channel pairs in the remainder of the band are allocated for nationwide systems, which receive significant attention and are typically in demand. Thus, a finder's preference program appears unnecessary to ensure that such channels are being used. The other channel pairs that are not subject to the proposals described above are 10 channel pairs allocated for public safety/mutual aid communications and 5 channel pairs for the Emergency Medical Radio service. These 15 channels are available to a fairly limited pool of potential users, which dramatically reduces the likelihood that a finder's preference claim would be filed. In addition, in the 10 public safety/mutual aid channels, finder's preference claims are even less likely because base/mobile and base/portable communications are conducted only on a secondary, non-interference basis to communications for emergencies or interoperability.

increasing the encumbrances on this spectrum with site-based licensees, thus reducing the flexibility of the geographic-based licensees and thereby impairing their ability to best serve the public. Accordingly, our decision to delay processing of these requests serves the public interest. Moreover, this decision is procedural in nature, and thus not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA), 5 U.S.C. §553(b)(A), (d).<sup>32</sup> We also observe that our ongoing compliance review procedures will ensure that this decision does not compromise the public interest in any way.

## V. Conclusion

13. We tentatively conclude that the finder's preference program, set forth in Section 90.173(k) of our Rules, should be eliminated with respect to the 220-222 MHz frequency band. The proposed implementation of geographic area licensing and competitive bidding procedures for mutually exclusive applications would make it unnecessary to enlist the assistance of the public in identifying unconstructed 220 MHz stations. We request public comment on this proposal and the accompanying proposed rules set forth in Appendix A. We also request comment on whether the finder's preference program should be retained or modified if we adopt these proposed rules, in light of its prospective limited applicability.

## VI. Procedural Matters

14. *Ex Parte Rules -- Non-restricted Proceeding.* This *Notice of Proposed Rule Making* proceeding is a non-restricted notice and comment proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. See generally 47 C.F.R. 1.1202, 1.1203, and 1.1206(a).

15. *Initial Regulatory Flexibility Analysis.* The Initial Regulatory Flexibility Analysis (IRFA), prepared pursuant to Section 241 of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), is contained in Appendix B.

16. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before November 18, 1996, and reply comments on or before December 3, 1996. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You must send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. You may also file informal comments by electronic mail. You should address informal comments to smagnott@fcc.gov. You must put the docket number of this

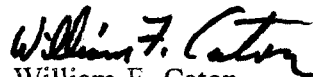
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<sup>32</sup> See *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

proceeding on the subject line (*see* the caption at the beginning of this *Notice*). You must also include your full name and Postal Service mailing address in the text of the message. Formal and informal comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

17. For further information, contact Susan Magnotti at (202) 418-0871 [smagnott@fcc.gov] or John Borkowski at (202) 418-0680 [jborkows@fcc.gov], Private Wireless Division, Wireless Telecommunications Bureau.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary



**APPENDIX A****PROPOSED RULES**

Chapter I of Title 47 of the Code of Federal Regulations, Part 90, is proposed to be amended as follows:

**I. Part 90 -PRIVATE LAND MOBILE RADIO SERVICES**

1. The authority citation for Part 90 would continue to read as follows:

**AUTHORITY:** Secs. 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. The introductory language of paragraph (k) of Section 90.173 would be revised by removing the words "220-222 MHz,".

## APPENDIX B

## INITIAL REGULATORY FLEXIBILITY ANALYSIS

1 *Need and purpose of the action.* The purpose of this *Notice* is to determine whether it is in the public interest, convenience, and necessity to amend our Rules to eliminate the finder's preference program for the 220-222 MHz frequency band. This program is designed to replace a site-based licensee who has failed to construct or operate its station with another site-based licensee who has identified this problem and is willing and able to make use of the spectrum. The Commission's pending proposals for geographic area licensing in this band, however, appear incompatible with the approach of the finder's preference program, which would substitute one site-based licensee for another. It also appears that maintaining the finder's preference program for the remaining licensees to which it would apply (non-commercial licensees in the 470-512 MHz, 800 MHz and 900 MHz frequency bands) may be unnecessary, as few prospective licensees in these frequency bands take advantage of the program.

2 *Objectives and legal basis of the action.* The objective of this *Notice* is to request public comment on the proposals made herein. The authority for this action is the Administrative Procedure Act, 5 U.S.C. § 553; and Sections 4(i), 4(j), 301, and 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. §§ 145, 301, and 303(r).

3 *Description and estimate of small entities affected.* The proposed rules would eliminate the opportunity to receive a dispositive preference for unconstructed channels in the 220-222 MHz frequency band. Any finder's preference applicants would fall into one of two categories: (1) entities that seek 220-222 MHz spectrum to provide a commercial subscription service, and (2) entities that seek 220-222 MHz spectrum to provide for their own internal communications needs. Theoretically, it is also possible that an entity could fall into both categories as well. The entities involved in each of these two categories are markedly different.

With respect to the first category, the Commission has not developed a definition of small entities applicable to 220-222 MHz licensees that provide commercial subscription services. Therefore, the applicable definition of small entity in this instance is the definition under the Small Business Administration rules applicable to radiotelephone companies. This definition provides that a small entity is any entity employing less than 1,500 persons.<sup>33</sup> The Commission seeks comment on the number of small entities that currently provide commercial 220-222 MHz subscription service, and the number of small entities that would anticipate filing finder's preference requests to provide such service if the program were not terminated.

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<sup>33</sup> See 15 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

The 1992 Census of Transportation, Communications and Utilities, conducted by the Bureau of the Census, which is the most recent information available, shows that only 12 radiotelephone firms out of a total of 1,178 such firms operated during 1992 had 1,000 or more employees. Therefore, whether or not any or all of these 12 firms are 220 MHz commercial service providers, nearly all 220 MHz commercial service providers are small businesses by the Small Business Administration's definition. We seek comment on whether we should conclude, for purposes of the Final Regulatory Flexibility Analysis in this matter, that all 220 MHz commercial communications service providers are small entities.

With respect to the second category, entities that seek 220-222 MHz spectrum to provide for their own internal communications needs, we note that private land mobile radio (PLMR) systems, including those at 220-222 MHz, serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed (nor would it be possible to develop) a definition of small entities specifically applicable to PLMR users. For the purpose of determining whether a licensee is a small business as defined by the Small Business Administration, each licensee would need to be evaluated within its own business area.

We seek comment on the number of small entities that use PLMR for their internal communications needs at 220-222 MHz, 470-512 MHz, 800 MHz and 900 MHz. Further we seek comment on the number of small entities that are likely to file finder's preference requests to obtain spectrum for their own internal communications needs. The Commission's most recent annual report indicates that at the end of fiscal year 1994 there were 309,812 stations using 6,234,904 transmitters in the 220-222 MHz, 470-512 MHz and 800-900 MHz frequency bands.<sup>34</sup> Because any entity engaged in a business or commercial activity is eligible to hold a PLMR license, this rule change could prospectively affect any small business in the United States interested in using PLMR for its own communications needs. In other words, the universe of prospective or possible PLMR users is all small businesses.

4 *Projected reporting, recordkeeping and compliance requirements.* This rule making proposes eliminating the finder's preference program with respect to the 220-222 MHz frequency band, and asks for comment on whether, if that action is taken, the program should be completely abolished. No new requirements would be imposed as a result of the actions proposed in this rule making. The ability to file a finder's preference application in some or all circumstances would be eliminated. The administrative requirements for filing such finder's preference applications would also be eliminated. Costs to prospective applicants for preparation and filing of finder's preference applications would also be eliminated.

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<sup>34</sup> 60th Annual Report, Fiscal Year 1994, Federal Communications Commission, at 121. These statistics, however, include SMR stations in the 800 MHz and 900 MHz frequency bands to which the finder's preference program is no longer applicable.

5 *Federal rules which overlap, duplicate or conflict with these rules.* None.